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## Labour law on the plateau: towards regulatory policy for endogenous norms

Deirdre McCann<sup>1</sup>

### Introduction

This paper investigates the post-crisis evolution of a pivotal transnational labour law narrative: that of the World Bank. The recent evolution of the Bank's account of labour law initially offered models of minimal regulation. After the crisis, however, it has generated more elaborate depictions of legitimate, or desired, labour regulation. Yet this crucial transnational institution remains unsettled on the substantive content of these expanded frameworks and on the nature and functioning of the norms that they embody. The paper tracks the evolution of the imagery of labour law generated by the World Bank over the last decade, from the *Doing Business* project to the 2013 *World Development Report*. The broader purpose is to take this evolution as an opportunity to consider the notions of legal regulation of markets that have been elevated by the crisis and the pertinence of contemporary labour regulation scholarship on international legal policy narratives.

In doing so, the paper addresses the autonomy of labour law in both discourse and institutional function. At the discursive level, it attends to the reception of legal regulation in economic policy and research narratives, and in particular to their rendition of the form, dynamics, and objectives of legal regulation. On the institutional dimension, the paper argues that the regulatory policy of the World Bank and the International Labour Organization (ILO) can usefully be conceived of as dynamic processes of institutional convergence and divergence. More broadly, the paper explores an important refashioning of the Bank's vision of labour law – grounded in the image of a 'regulatory plateau' – that embraces the benefits of regulation and embeds a more sophisticated conception of the operation of regulatory regimes.

In this regard, the paper contributes to a line of legal scholarship that has tracked and assessed the trajectory of transnational labour law narratives. Rittich, centrally, has examined the influence of regulatory narratives generated by the International Financial Institutions (IFIs) on the nature and function of legal regulation<sup>2</sup> and, more recently, the diversification of the international-level sources of labour law guidance.<sup>3</sup> The paper is also a contribution to the evolving academic reflections, including by the author, on the narratives of labour regulation that are generated by economic theoretical, research and policy discourses,<sup>4</sup> and is aligned with recent work that offers a neo-

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<sup>2</sup> Kerry Rittich, 'Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart 2006).

<sup>3</sup> Kerry Rittich, 'Precarious Work and the Fragmentation of International Labour Law' [2014] *London Review of International Law* (forthcoming).

<sup>4</sup> Simon Deakin and Prabirjit Sarkar 'Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data' (2008) 39 *Industrial Relations Journal* 453-87; Simon Deakin, 'The Evidence-Based Case for Labour Regulation' in Sangheon Lee and Deirdre McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (Palgrave MacMillan/International Labour Office 2011); Sangheon Lee and Deirdre McCann, 'New Directions in Labour Regulation Research' and 'The Impact of Labour Regulations: Measuring the Effectiveness of Legal Norms in a Developing Country' in Lee and McCann *Regulating for Decent Work*; Sangheon Lee and Deirdre McCann 'Regulatory Indeterminacy and Protection in Contemporary Labour Markets: Innovation in Research and Policy' in Deirdre McCann, Sangheon Lee, Patrick Belser, Colin Fenwick, John Howe and Malte Luebker, *Creative Labour Regulation: Indeterminacy and Protection in an Uncertain World* (Palgrave MacMillan/International Labour Office 2014).

institutional account of legal regulation in which legal rules are rendered as endogenous to the market.<sup>5</sup> The paper points to key limitations that should be addressed for a more robust and effective vision of labour regulation at the international level.

## 1. Quantified flexibility: the decline and fall of the *Employing Workers Index*

During much of the last decade, the *Doing Business* project was the World Bank's flagship engagement with labour regulation.<sup>6</sup> The project is now familiar.<sup>7</sup> It evaluates a range of 'business regulations' from around 190 countries using a set of indicators that quantify and compare sub-fields of legal regulation (starting a business; dealing with construction permits; getting electricity; registering property; paying taxes; trading across borders; getting credit; protecting investors; enforcing contracts; resolving insolvency; and employing workers).<sup>8</sup> The project provides an overall aggregate ranking in a *Ease of Doing Business Index*, disseminates its results through a series of annual reports<sup>9</sup>, and identifies, celebrates and rewards countries whose regulatory frameworks are most favourable to the 'business environment'.<sup>10</sup> The project's engagement with labour regulation is through the '*Employing Workers Index*' (EWI), which measures and compares laws on 'hiring' (fixed-term contracts; minimum wages); working hours (night work, weekly rest, weekly hours, paid annual leave); and redundancy. Each sub-index ranges from 0 to 100 and is a simple average of a set of binominal indicators that assess elements of domestic labour law regimes.<sup>11</sup> Based ostensibly on the work of Botero and colleagues,<sup>12</sup> the EWI can be situated in the trend towards research projects that quantify and compare labour regulations.<sup>13</sup>

The *Doing Business* project has been the subject of intense and sustained criticism, which has ultimately triggered an ongoing process of reform. The most damaging criticisms have been directed at the project's engagement with labour regulation.<sup>14</sup> For present purposes, two key themes can be

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<sup>5</sup> Deakin (n 4).

<sup>6</sup> <[www.doingbusiness.org/](http://www.doingbusiness.org/)>.

<sup>7</sup> Kevin E Davis and Michael B Kruse, 'Taking the Measure of Law: The Case of the *Doing Business* Project' (2007) 32 (4) *Law and Social Inquiry* 1095; Janine Berg and Sandrine Cazes, 'Policymaking Gone Awry: The Labor Market Regulations of the *Doing Business* Indicators' (2008) 29(4) *Comparative Labor Law and Policy Journal* 349; Lee and McCann, 'New Directions' (n 4); Peter Bakvis, 'The World Bank's *Doing Business* Report: A Last Fling for the Washington Consensus?' (2009) 15 (3-4) *Transfer: European Review of Labour and Research* 419.

<sup>8</sup> World Bank, 'Doing Business: A Joint Publication and Project by the World Bank and IFC' <[www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Miscellaneous/What-is-Doing-Business.pdf](http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Miscellaneous/What-is-Doing-Business.pdf)> accessed 15 June 2014.

<sup>9</sup> Most recently, World Bank, *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises* (World Bank 2013).

<sup>10</sup> See country rankings at <[www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings)> accessed 15 June 2014. Prior annual reports have identified 'Top Reformers,' which were designated members of a 'Doing Business Reformers' Club.' See World Bank *Doing Business 2007: How to Reform*, 2, Table 1.1; *Celebrating Reform 2009: Doing Business Case Studies* (2009), 1. The project currently identifies 'most improved economies': <[www.doingbusiness.org/Reforms](http://www.doingbusiness.org/Reforms)> accessed 15 June 2014.

<sup>11</sup> See further Davis and Kruse (n 7); Berg and Cazes (n 7).

<sup>12</sup> Juan Carlos Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Schleifer 'The Regulation of Labour' 2004 119(4) *The Quarterly Journal of Economics* 1339.

<sup>13</sup> See also Simon Deakin, Priya Lele and Mathias Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133; Deakin and Sarkar (n 4); Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney and Shelley Marshall, 'The Evolution of Labour Law in Australia: Measuring the Change' (2001) 23 *Australian Journal of Labour Law* 1; Peter Gahan, Richard Mitchell, Sean Cooney, Andrew Stewart, Brian Cooper, 'Economic Globalization and Convergence in Labor Market Regulation: An Empirical Assessment' (2012) *American Journal of Comparative Law* 60(3) 703.

<sup>14</sup> See works cited in n 7.

identified among the assessments of the EWI's conception and design. These interrogate two interlinked set of assumptions that are encoded in the Index's methodology and associated rhetoric on (1) the substantive scope of legitimate labour regulation and (2) the nature, functioning, and effects of regulatory frameworks.

To elaborate on the first theme, it is well-rehearsed that the account of the legitimate subject-matter of labour regulation offered by the *Doing Business* project is highly constrained.<sup>15</sup> Less frequently observed is that this sparse portrait is grounded in a conviction that labour rights can be neatly divided into the fundamental and the residual. The core/non-core narrative enshrined by the ILO in its 1998 *Declaration on Fundamental Rights and Principles at Work* has been pivotal to the conceptual framing, methodology and rhetorical stridency of the *Doing Business* project.<sup>16</sup> Unleashed by the ILO into the sphere of international labour regulation policy, the *Declaration's* assertion that the rights to freedom of association and collective bargaining and to protection from forced labour and child labour are fundamental has had consequences that have been predictable, yet perhaps unexpectedly enduring. Among the most substantial is that a rendition of fundamentality is at the heart of both methodology and policy discourse in *Doing Business*. The core/non-core distinction is embedded in the selection of the regulatory subjects measured by the EWI sub-indices, which target only non-core elements of transnational and domestic labour law schema (employment protection, minimum wages, working time). At the rhetorical level, it is a point of honour in the *Doing Business* literature that none of the 'core' entitlements are subject to quantification, measurement or ranking.<sup>17</sup> Non-core regimes, in contrast, have explicitly been conceived of as harbourers of damaging economic impacts.<sup>18</sup>

The 1998 *Declaration* was condemned, most prominently by Alston, as the ill-judged bifurcation of what was conceived of as an integrated international labour code.<sup>19</sup> Other contributions have stressed that the regulatory objectives subordinated by the *Declaration*, and more broadly during the core rights era, are centrally those towards the improvement of working conditions.<sup>20</sup> For present purposes, the pivotal consequence of the *Declaration* is that the World Bank grasped the core/non-core duality - in the kind of deployment feared by Alston and others - to profoundly diminish non-core rights.

The transmission of the core/non-core schema illuminates the analysis of the institutional autonomy of labour law at the international level. The recent history of international labour law has been characterised by Rittich as a process of fragmentation in which competing or converging norms and

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<sup>15</sup> Ibid.

<sup>16</sup> See also Deirdre McCann, 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms' (2012) 34(1) *Comparative Labour Law and Policy Journal* 167.

<sup>17</sup> Most recently, World Bank *Doing Business 2014* (n 9) 122, n 2.

<sup>18</sup> Lee and McCann, 'Measuring Labour Market Institutions: Conceptual and Methodological Questions on "Working-Hour Rigidity"' in Janine Berg and David Kucera (eds), *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (ILO and Palgrave 2008). See e.g. World Bank *The World Development Report: A Better Investment Climate for Everyone* (World Bank 2004). The *Doing Business* literature now asserts that the indices 'are fully consistent with' ILO conventions, World Bank *Doing Business 2014* (n 9) 118.

<sup>19</sup> Phillip Alston and James Heenan 'The Shrinking of the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?' (2004) 36 *New York University Journal of International Law and Politics* 221; Phillip Alston, 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) *European Journal of International Law* 467. See also Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29(1) *Comparative Labor Law and Policy Journal* 29.

<sup>20</sup> McCann, 'The Holistic Assessment of Non-Standard Work Norms' (n 16).

regulatory guidance are transmitted by a multiplying array of actors.<sup>21</sup> Within this analytical framework, the relationship between the ILO and World Bank in the decade from the Declaration to the global financial crisis can be read as signalling not merely a convergence of narratives but an institutional convergence, which pivots on the role of these two institutions in fashioning and disseminating regulatory policy. On closer analysis, further, this institutional convergence can be understood to embody layers of interaction that have, in aggregate, curbed the institutional autonomy of the ILO.

First, the *Doing Business* project relays an account of the economic impact of labour regulation, including on regulatory subjects shared with the ILO's standards. Predicting labour's regulation's economic effects is a role on which the World Bank has long staked a claim. Yet *Doing Business* has not merely reiterated the familiar - abstract - narrative of labour regulation's inhibiting effects. The project has also, second, propelled a convergence in legal policy strategy towards detailed guidance on the design of legal frameworks. As has been argued elsewhere, the EWI has translated open-textured flexibility narratives into detailed prescriptions for legal design, sending a 'message to law' to legal policy actors.<sup>22</sup> This advisory role had previously been assumed to be primarily the domain of the ILO, at least at the level of generic global guidance (guided by the regulatory frameworks that are suggested by the standards). Third, on the most fundamental level, a claim was staked in the *Doing Business* project that narratives of the relevance and status of the ILO's standards could be co-piloted by the World Bank. The borrowing of the core/non-core dichotomy by *Doing Business* can therefore be identified, with hindsight, as the death-knell of the ILO's unchallenged pre-eminence in the international labour law arena. The outcome is that the Organization no longer assuredly governs its own discourses on legal regulation, including as they relate to ILO norms.

The *Doing Business* project therefore shifted the Bank onto institutional and legal policy terrain conventionally occupied by the ILO. In this analysis, *Doing Business* elevated the ILO, by integrating its standards and concepts (decent work, fundamental rights and principles) into the economic debates on labour regulation. The *Declaration* has also helped substantially to shield the most precarious of the fundamental rights from the sights of the International Financial Institutions, namely the right collectively to bargain. Yet it simultaneously diminished the Organization's normative authority by destabilizing already neglected discourses on the role of the ILO's non-core standards in contemporary economic life (including regulatory objectives that are co-pursued through collective bargaining). In the transmission of the core/non-core narrative, the ILO set the frame but was unable or unwilling to dictate the path of the engagement.

Such paths of convergence with the Bank, and other transnational legal policy and adjudicative institutions, appear to be exercising an internal paralysis among ILO policy and legal actors. The first report of the new Director-General of the ILO to the June 2013 International Labour Conference revealed an internal unease over the normative dimension of the ILO's work.<sup>23</sup> The report admits to an fraught internal debate - 'described by some as a crisis'<sup>24</sup> - centred on standard-setting. The focus of the DG's Report is partly on the future of the Organization's oversight mechanisms and standard-setting, but also embraces the dissemination of existing norms. It is particularly notable that the Report in part attributes the normative crisis to institutional and discursive convergence,

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<sup>21</sup> Rittich 'Rights, Risk, and Reward' (n 2).

<sup>22</sup> McCann 'The Holistic Assessment of Non-Standard Work Norms' (n 16).

<sup>23</sup> International Labour Office, *Towards the ILO Centenary: Realities, Renewal and Tripartite Commitment*, Report of the Director-General, International Labour Conference, 102<sup>nd</sup> Session, 2013 (ILO 2013).

<sup>24</sup> Ibid 19.

[P]aradoxically, one of the reasons cited for the emergence of controversy at this point in the ILO's history is precisely that the outputs of the supervisory system are increasingly influential as a reference point in numerous settings outside the ILO itself.<sup>25</sup>

The second key theme that unites prominent criticisms of *Doing Business* is the limitations of the EWI in capturing the nature, functioning, and therefore impact of labour market regulations. Certain of the Index's deficiencies in this regard are technical: they are grounded in a misreading of legal systems as a whole or the interaction of the internal components of labour law systems.<sup>26</sup> The Index does not recognise functional equivalents of statutory regulation, for instance, thereby downgrading regimes that regulate predominantly via bargaining.<sup>27</sup> It also misreads how certain components of regulatory sub-fields interact and whether the classification of legal data will accurately capture the measurement goals of the sub-indices.<sup>28</sup>

Given the Bank's subsequent conversion to the merits of labour regulation, traced in the following Section, the most salient critique of *Doing Business* is the overarching analysis that probes the theoretical underpinnings of the project.<sup>29</sup> This literature has argued that *Doing Business* rests on a model of development that, by neglecting most of the benefits of regulation, embeds the tenets of orthodox economic theory.<sup>30</sup> The critique embraces the assessment of labour standards in the EWI, which is configured to restate, in quantified form, orthodox economic theory's stark dichotomy between regulation and deregulation.<sup>31</sup> As Davies and Freedland have observed in their investigation of labour law's autonomy, the deregulatory account of labour law holds there to be 'a simple, direct, relationship between the removal of the protections of labour law and the creation of jobs.'<sup>32</sup> Resting on a default model of the perfectly competitive market, labour regulations are assumed inexorably to raise unemployment and informal employment and impede growth.<sup>33</sup> Although complicated by its tolerance of the right collectively to bargain, *Doing Business* absorbs and reflects the orthodox account, by advising constrained expectations of the intensity of non-core regulation (in the sense of demands on the employer, whether administrative, financial, work organization, hiring strategy etc.)

The details of how the EWI sub-indices prize minimal regulation has been extensively mapped in the literature.<sup>34</sup> In the 'difficulty of hiring' sub-index, for example, restrictions on the purposes or maximum cumulative duration of fixed-term contracts are downgraded while redundancy regulations rank highest when their costs (advance notice requirements, severance payments and

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<sup>25</sup> Ibid 20.

<sup>26</sup> Berg and Cazes (n 7); Deakin and Sarkar (n 4); Lee and McCann, 'Measuring Labour Market Institutions' (n 18).

<sup>27</sup> Ibid.

<sup>28</sup> Lee and McCann, 'Measuring Labour Market Institutions' (n 18). With respect to weekly hours, for example, it is apparent that the Rigidity of Hours indice is intended to capture regulatory frameworks in which extensive working hours are permitted during periods of no more than two months a year, World Bank *Doing Business 2014* (n 9). Yet the data and indice capture without distinction regulatory frameworks that contain time-limited extensions and those (e.g. the U.S.) that place no limit (other than overtime premia) on weekly hours. For details on the Rigidity of Hours sub-index, see 'Employing Workers Methodology' <[www.doingbusiness.org/methodology/employing-workers](http://www.doingbusiness.org/methodology/employing-workers)> accessed 15 June 2014.

<sup>29</sup> Berg and Cazes (n 7); Independent Evaluation Group, *Doing Business: An Independent Evaluation* (World Bank 2008); Lee and McCann, 'Measuring Labour Market Institutions' (n 18).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Paul L Davies and Mark Freedland, 'Employees, Workers, and the Autonomy of Labour Law' in Hugh Collins, , Paul L Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer 2000) 270.

<sup>33</sup> Deakin (n 4).

<sup>34</sup> See in particular Berg and Cazes (n 9); Lee and McCann 'Measuring Labour Market Institutions' (n 18).

penalties for terminating redundant workers) are minimal.<sup>35</sup> In consequence, the EWI generates an account of the intensity of labour law much diminished from the frameworks and regulatory techniques that are embedded in the related international norms and in most domestic-level regimes.<sup>36</sup> This deregulatory orientation has endured despite periodic adjustments to the methodology. To single out a striking illustration derived from the 2014 dataset, for example, it is apparent that the highest score under the 'Rigidity of Hours' sub-indices can be accorded to legal systems that permit weekly hours uninhibited by constraints other than a rest day.<sup>37</sup>

Scholarly work has also identified orthodox economic theory to harbour a - more elusive - theory of how regulatory frameworks operate. Deakin has prised a discrete account of law from orthodox theory.<sup>38</sup> In this account, he points out, legal regulation emerges as an 'an external force imposed upon an otherwise 'unregulated' market.'<sup>39</sup> Since laws operate as an external imposition on market relations, legal rules therefore appear as exogenous to the labour market. This narrative, further, carries an associated assumption about the operation of laws: that they are 'complete,' in the sense of certain in scope of application and self-executing.<sup>40</sup> A formalist narrative, implicitly depicts labour law frameworks as static and constrained: the influence of legal standards is assumed to be determined by their textual and institutional parameters.<sup>41</sup> In this account, therefore, labour law is understood as autonomous from economic and social systems, to the detriment of an accurate conception of its functioning.

This account of labour law's autonomy is particularly stark in the quantified version of the flexibility narrative embedded in certain indicator projects. This reading of labour law frameworks underpins the incapacity of *Doing Business* indices to the *de facto* influence of regulatory frameworks. This limitation is common, and unobjectionable, in quantification projects.<sup>42</sup> It is less persuasive, however, when fuelling guidance on policy reform. In the policy arena, the formalist narrative is particularly pertinent to the account in the *Doing Business* literature on the relevance of law to the informal economy. Centrally to the conception of the promise of legal regulation in low-income economies, the World Bank has crafted an image of legal regulation as entirely distinct from the informal economy.<sup>43</sup> This 'pessimistic' account of labour law's promise<sup>44</sup> hinges on a clear-cut dichotomy between the 'formal' and 'informal' economies. It thereby ignores evolving formalisation within formal settings.<sup>45</sup> Most pertinently to the concerns of this paper, labour standards emerge as unknown or entirely irrelevant to informal workers.<sup>46</sup> Yet labour law systems are better understood to harbour dynamic capacities beyond their textual demands, which encompass an influence in informal settings (see further the discussion of 'institutional dynamism' in Section 3 below).

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<sup>35</sup> See 'Employing Workers Methodology' (n 28).

<sup>36</sup> On working time, see Lee and McCann 2008, pp 41-42, Table 3.1.

<sup>37</sup> 'Data Points and Details, 2014,' available from <[www.doingbusiness.org/data/exploretopics/employing-workers](http://www.doingbusiness.org/data/exploretopics/employing-workers)> accessed 15 June 2014. See further n 28.

<sup>38</sup> Deakin (n 4).

<sup>39</sup> Ibid 35.

<sup>40</sup> Deakin (n 4). See also Lee and McCann's analysis of this model as configuring legal frameworks as comprehensive (protecting all workers within their formal ambit) and complete (workers are entitled to the full array of legal protections, to the maximum permissible extent), 'The Impact of Labour Regulations' (n 4).

<sup>41</sup> Lee and McCann, *ibid*.

<sup>42</sup> Deakin & Sarkar (n 4).

<sup>43</sup> Lee and McCann 'Measuring Labour Market Institutions' (n 18). See *The World Development Report: A Better Investment Climate for Everyone* (n 18).

<sup>44</sup> Lee and McCann, 'The Impact of Labour Regulations' (n 4).

<sup>45</sup> See e.g. Kamala Sankaran, 'Flexibility and Informalisation of Employment Relationships' in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Hart 2012).

<sup>46</sup> e.g. World Bank *Doing Business 2006: Creating Jobs* (World Bank 2005).

The post-crisis history of the EWI has been a story of decline. Forcefully criticised in the research literature<sup>47</sup> and subsequently by the Bank's own Independent Evaluation Group (IEG),<sup>48</sup> the *Doing Business* project was further discredited by an Independent Panel of Experts that reported in the summer of 2013.<sup>49</sup> The EWI has been pivotal to this decline. Since the IEG report, it has been downplayed in *Doing Business*.<sup>50</sup> The Index is no longer integrated into countries' overall ranking,<sup>51</sup> Bank units are prohibited from taking it into account as an element of loan conditionality,<sup>52</sup> and it has been exiled to an Annex of the annual reports.<sup>53</sup> The Independent Panel concluded that the *Doing Business* project should endure (albeit renamed), but should be redesigned to respond to criticisms of its reliability and validity, including by jettisoning the aggregate ranking.<sup>54</sup> Further, the Panel recommended that a careful reconsideration of the EWI methodology should be undertaken, outside of the *Doing Business* project, and should incorporate protective goals.<sup>55</sup>

More recently, the regulatory drama of the World Bank has offered both a more expansive picture of the substantive scope of legitimate labour regulation and a more sophisticated understanding of the nature and functioning of legal frameworks and of their potential economic effects. The 2013 *World Development Report* (WDR2013) both confirmed the diminished internal influence of the *Doing Business* project and unveiled a new narrative on the scope, purpose and functioning of labour market regulation. This *volte-face* is the subject of the following Section.

## 2. From underregulation bias to the regulatory plateau: the *World Development Report* 2013

WDR2013 - entitled *Jobs* – acknowledges that growth does not inevitably translate into employment.<sup>56</sup> (Private) employment creation is the heartbeat of the Report's development model: '[j]obs are the cornerstone of development, and development policies are needed for jobs.'<sup>57</sup> More prominently than the Bank's earlier literature, the Report acknowledges a set of social objectives for employment: for the individual (earnings, benefits, self-esteem, happiness) and societal-level gains that include investments in the education and health of children, providing alternatives to violence, raising living standards and – notably - ensuring both productivity and social cohesion.<sup>58</sup> The Report builds on this insight to contribute to the existing typologies of 'good jobs.' It debuts a novel variant

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<sup>47</sup> See n 7.

<sup>48</sup> Independent Evaluation Group, *Doing Business: An Independent Evaluation* (World Bank 2008).

<sup>49</sup> Independent Review Panel, *Independent Panel Review of the Doing Business Report* (World Bank 2013).

<sup>50</sup> World Bank, 'Revisions to the Doing Business Employing Workers Indicator' (Memorandum, 27 April 2009) <[www.doingbusiness.org/methodology/~media/fpdkm/Doing%20Business/Documents/Methodology/EWI/EWI-revisions.pdf](http://www.doingbusiness.org/methodology/~media/fpdkm/Doing%20Business/Documents/Methodology/EWI/EWI-revisions.pdf)> accessed 15 June 2014; World Bank, 'Guidance Note for World Bank Group Staff on the Use of the Doing Business Employing Workers Indicator for Policy Advice' (3 October 2009), <[www.doingbusiness.org/methodology/~media/fpdkm/doing%20business/documents/methodology/ewi/ewi-guidance-note.pdf](http://www.doingbusiness.org/methodology/~media/fpdkm/doing%20business/documents/methodology/ewi/ewi-guidance-note.pdf)> accessed 15 June 2014.

<sup>51</sup> See World Bank *Doing Business 2014* (n 9) 2.

<sup>52</sup> World Bank, 'Guidance Note' (n 50). In 2013, the Independent Review Panel noted that '[f]ortunately, the indicator's use in loan conditionality seems to have ended after its suspension' (n 49) 35.

<sup>53</sup> See World Bank *Doing Business 2014* (n 9), Annex, 119-122. Data is still gathered and made available on the *Doing Business* website, n 37. The Bank continues explicitly to evaluate and classify domestic norms (classified as 'excessively flexible,' 'balanced' and 'excessively rigid'); see World Bank *Doing Business 2014*, Annex.

<sup>54</sup> The Panel suggested instead that the cardinal values for each of the indicators be emphasised, Independent Review Panel (n 49) 4. The Panel also called for the project's title to be changed, a peer-review process introduced, the methodology reformed, and the project relocated within the World Bank. See 'Recommendations' 4-6, 20-22.

<sup>55</sup> Independent Review Panel *ibid* 36.

<sup>56</sup> World Bank, *World Development Report 2013: Jobs* (World Bank 2012).

<sup>57</sup> *Ibid* 3.

<sup>58</sup> *Ibid* 2.



on the available models,<sup>59</sup> which it labels ‘good jobs for development.’<sup>60</sup> These are jobs with ‘the highest payoff to society,’<sup>61</sup>

[S]ome jobs also have spill overs on the living standards of others, on aggregate productivity, or on social cohesion. When spill overs are positive, the job has a greater value to society than it has to the person who holds it....<sup>62</sup>

WDR2013 recommends a three-layered policy blueprint for cultivating good jobs for development,

- **Fundamentals** are identified as a prerequisite for job creation in the private sector.<sup>63</sup> The central policy fundamentals are identified as macroeconomic stability, an enabling business environment, human capital, and the rule of law.
- **Labour policies** convert growth into jobs. These are defined as ‘policies and institutions’ that include labour market regulation, collective bargaining, active labor market programs, and social insurance.<sup>64</sup>
- **Policy Priorities.** Policy actors are called on to establish the priorities that will support good jobs for development. In this stratum of the policy pyramid, restraints on the private sector in its job creation role are attributed to market imperfections and institutional failures.<sup>65</sup> Policy priorities allow policy actors to remove these restraints and to identify the types of jobs that generate optimal development outcomes.

WDR2013 has been welcomed in the policy sphere for honing in on the persistent unemployment that has characterised the post-crisis period.<sup>66</sup> The ‘good jobs for development’ paradigm also holds some promise.<sup>67</sup> Typologies of ‘good jobs’ in the academic literature have been elaborated primarily in the context of the advanced industrialised economies and are ripe to be extended to low-income countries. Most saliently for this paper, the Report also offers a substantial recalibration of the Bank’s engagement with labour law. Departing from the *Doing Business* model of minimal regulation, it showcases a novel appreciation of the labour regulation/employment nexus and of the functioning and capacities of regulatory frameworks. The purpose of this Section is to evaluate the Report’s conception of labour regulation and to explore how it parallels certain advances in the research literature.

The recent labour regulation literature has reassessed neo-classical theory’s rendering of the relation between legal and economic systems and the economic impacts of labour laws. In part the advances in this literature are methodological. Deakin has highlighted that refinements in the cross-national measurement of labour regulations and in time series and panel data econometrics are

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<sup>59</sup> See in particular Arne L Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s to 2000s* (Russell Sage Foundation 2011).

<sup>60</sup> World Bank *World Development Report 2013* (n 56) Part 2.

<sup>61</sup> Ibid 159.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid, 257.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

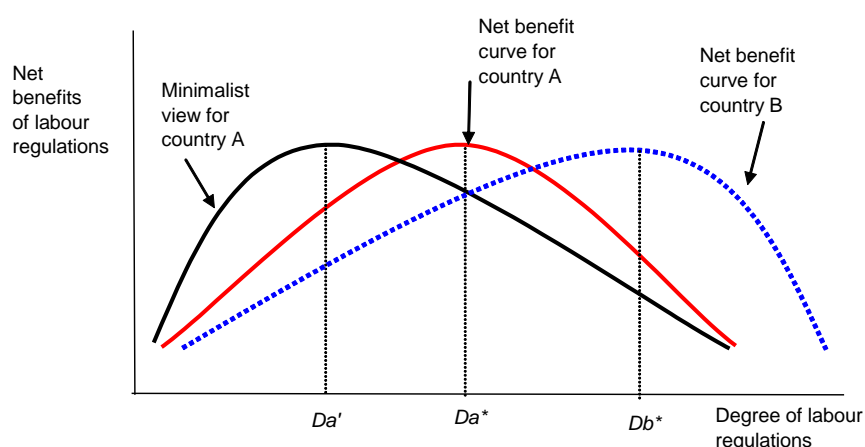
<sup>66</sup> Peter Bakvis ‘World Bank Jobs Report: Detailed Analysis,’ 2 October 2012, <[www.tuc.org.uk/international-issues/globalisation/international-development/global-economic-justice-campaigns/world](http://www.tuc.org.uk/international-issues/globalisation/international-development/global-economic-justice-campaigns/world)> accessed 15th June 2014.

<sup>67</sup> Although see Bakvis’ reservations about the concept of ‘good jobs for development’ as a replacement for ‘decent work,’ *ibid*.

sustaining more sophisticated assessments of the economic impact of labour legislation.<sup>68</sup> These research findings suggest that the effects of legal regulations on growth, employment and informal employment are not those predicted by orthodox economic theory.<sup>69</sup> Macleod's recent survey of empirical evidence on the impacts of EPLs, for example, has concluded that theoretical predictions about negative employment impacts lack empirical grounding.<sup>70</sup> Similarly, minimum wage laws have been found to have no negative impact on employment and even to enhance productivity.<sup>71</sup>

To argue that the potential benefits of labour regulations – both economic and social – should be more explicitly considered in analyses of the impacts of labour law, Lee and McCann have offered a model for conceptualising optimal labour regulation.<sup>72</sup> Failure to take into account the benefits of regulation generates what the authors characterise as an 'underregulation bias.' This insight is reproduced in graphic form in Figure 1, which recognises that the net benefits of labour regulations can be jeopardised both by regulations that are too onerous, or ill-designed, and those that are too minimal. In Figure 1, the minimalist approach - underregulation - is illustrated in the curve as  $Da'$  and the optimal degree of regulation as  $Da^*$ .

Figure 1. Net benefits of labour regulations: an illustration



Source: Lee and McCann (2011), Figure 1.1, adapted from Wright (2004, Figure 2)<sup>73</sup>

WDR 2013 to a degree parallels the scholarly literature's reassessment of the economic impacts of labour regulation. The Report acknowledges the substantial research findings that indicate that labour regulations do not inhibit job creation.<sup>74</sup> Mirroring the conclusions of the research literature, it observes that the '[e]stimated effects [of labour regulations] prove to be relatively modest in most

<sup>68</sup> Deakin (n 4).

<sup>69</sup> Deakin (n 4).

<sup>70</sup> W Bentley Macleod, 'Great Expectations: Law, Employment Contracts, and Labour Market Performance,' (2011) 4(b) *Handbook of Labor Economics* 1591.

<sup>71</sup> See International Labour Organization, *Global Wage Report 2010/2011: Wage Policies in Times of Crisis* (ILO 2010).

<sup>72</sup> Lee and McCann 'Regulatory Indeterminacy' (n 4).

<sup>73</sup> Erik Olin Wright, 'Beneficial Constraints: Beneficial for Whom?' (2004) 2 *Socio-Economic Review* 407.

<sup>74</sup> The Report cites Tito Boeri, Brooke Helppe and Mario Macis 'Labour Regulations in Developing Countries: A Review of the Evidence and Directions for Future Research' (World Bank Social Protection Discussion Paper No. 0833) (World Bank 2008); Richard Freeman, 'Labor Regulations, Unions and Social Protection in Developing Countries: Market Distortions or Efficient Institutions?' in Dani Rodrik and Mark Rosenzweig (eds), *Handbook of Development Economics* (Vol. 5) 4657 (Elsevier 2009); Gordon Betcherman, 'Labor Market Institutions: A Review of the Literature' (Background Paper for the World Development Report 2013) (World Bank 2012).

cases – certainly more modest than the intensity of the debate would suggest.’<sup>75</sup> The Report concludes,

Overall, labor policies and institutions are neither the major obstacle nor the magic bullet for creating good jobs for development in most countries.<sup>76</sup>

To reach this conclusion, WDR2013 ventures beyond the boundaries of neo-classical labour economics, to entertain alternative explanations for poor employment outcomes. To this end, it acknowledges that the crucial constraints on job creation often lie beyond the labour market,

When faced with jobs challenges, policy makers tend to look first at labor policies as either the solution or the problem....But the main constraints to the [sic] job creation often lie outside the labor market, and a clear approach is needed to support appropriate policy responses.<sup>77</sup>

Rationales are offered for poor employment outcomes in countries at a range of income levels.<sup>78</sup> Thus in agrarian economies, the Report suggests, low productivity in smallholder farming is most likely to be attributable to deficiencies in agricultural research and extension.<sup>79</sup> In higher-income countries in which a lack of competition in the advanced technology sector is suggested to contribute to youth unemployment, ‘[c]ronyism and political favouritism’ are credited as the most likely culprits.<sup>80</sup>

The Report also responds to calls for the Bank to take account of the benefits of regulation. In doing so, the WDR2013 offers a similar analysis to Lee and McCann’s account of underregulation bias and optimum labour regulation, in this case expressed in an imagery of apt labour regulation as a plateau. The Report acknowledges the risk that labour regulations may not only be too rigid but also too lax, and that both rigid and weak regulatory frameworks can have detrimental effects on productivity.<sup>81</sup> Between these extremes, the Bank suggests, lies a plateau of regulation of appropriate intensity and form. Labour policies that are not to undermine job creation, while maximising development payoffs from jobs, must remain on this plateau,

Excessive or insufficient interventions can certainly have detrimental effects on productivity. But in between these extremes lies a “plateau” where effects enhancing and undermining efficiency can be found side by side and most of the impact is redistributive.<sup>82</sup>

This plateau is encircled by ‘cliffs’ that denote errors of contrasting genres,

Labour policy should avoid two cliffs: the distortionary interventions that clog the creation of jobs in cities and in global value chains, and the lack of mechanisms for voice

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<sup>75</sup> World Bank *World Development Report 2013* (n 56) 259.

<sup>76</sup> Ibid.

<sup>77</sup> World Bank *World Development Report 2013* (n 56) 257.

<sup>78</sup> See the Bank’s typology of ‘job challenges,’ World Bank *World Development Report 2013* (n 56) 18-19; 20, Figure 14.

<sup>79</sup> Ibid 25.

<sup>80</sup> Ibid 25-26.

<sup>81</sup> Ibid 258.

<sup>82</sup> Ibid.

and protection from the most vulnerable workers, regardless of whether they are wage earners.<sup>83</sup>

As Section 1 has suggested, inflexible labour laws have long haunted the regulatory visions of the World Bank. Rigidity's appearance in WDR2013 as one of the cliffs of the regulatory plateau is therefore unexceptional. The Report cautions,

Policies should seek to avoid the distortive interventions that stifle labor reallocation and undermine the creation of jobs in functional cities and global value chains.<sup>84</sup>

The novelty of this post-crisis phase of the Bank's engagement with labour law – central to this paper – is its discovery of the risks of weak labour regulation: '[t]his cliff may be less visible than excessive labour market rigidity, but it is no less real.'<sup>85</sup> Signalling an awareness of the potential for underregulation bias, the report explicitly rejects minimal regulation,

If rules that are too weak, or not enforced, the problems of poor information, unequal bargaining power, or inadequate risk management remain unaddressed.<sup>86</sup>

This risks of underregulation, further, encompass the social goals of regulation. This second 'cliff' is stated to presage low living standards and disrupted social cohesion.<sup>87</sup>

The significance of WDR2013, and of the image of the regulatory plateau, should not be understated. The *Jobs* Report harbours a markedly more sophisticated conception of labour regulation – including of its protective objectives – than the models generated by the *Doing Business* project. As such, it signals a substantial post-crisis shift in the World Bank's tolerance of legal intervention in labour markets. It remains to be seen if this stance will be sustained in the Bank's legal policy discourses. The 2014 *World Development Report – Risk and Opportunity* – is less exuberant: at points it recalls pre-crisis language on the hazards of regulation and the limited scope of feasible intervention ('[w]hile in many areas regulations can be excessive and disruptive of market forces, stronger regulations are needed for workplace safety, consumer protection and environmental preservation').<sup>88</sup> In contrast, the Independent Panel of Experts that reviewed *Doing Business* suggested WDR 2013 as a guide for the redesign of the project, highlighting the Report's assertion that regulation can be pitched at a range of levels and varieties on the plateau.<sup>89</sup>

Yet the inclusion of labour regulation on the menu of policy-makers – beyond a bland commitment to dismantling legal protections – inevitably generates a set of complex dilemmas about the form, intensity and functioning of legal regulation. The World Bank's warmer embrace of labour law and of cognate regulatory frameworks is a crucial uncertainty in mapping the trajectory of international labour law narratives. Retaining the framework of analysis used in Section 1, two dimensions can be distinguished, namely the substantive scope and the functioning of regulation.

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<sup>83</sup> Ibid 22.

<sup>84</sup> Ibid 257.

<sup>85</sup> Ibid 27.

<sup>86</sup> Ibid 263.

<sup>87</sup> Ibid 22.

<sup>88</sup> World Bank *World Development Report: Risk and Opportunity – Managing Risk for Development* (World Bank 2014), 27. The 2014 Report also cites 'labor market regulations that purport to defend workers' interests but wind up protecting only a few and contributing to the roots of a large informal sector,' 40.

<sup>89</sup> Independent Review Panel (n 49) 36. WDR2013 has also had a visible external influence: see e.g. International Monetary Fund 'Jobs and Growth: Analytical and Operational Considerations for the Fund' (14<sup>th</sup> March 2013) <[www.imf.org/external/np/pp/eng/2013/031413.pdf](http://www.imf.org/external/np/pp/eng/2013/031413.pdf)> accessed 15<sup>th</sup> June 2015.

On the substantive dimension of the regulatory plateau, it is evident that it hosts the 1998 *Declaration's* fundamental rights. WDR2013 devotes ample space to lauding the spread of collective bargaining onto virgin territory. China's decade of legislative reform on trade unions, labour contracts and dispute resolution is warmly endorsed.<sup>90</sup> These legislative reforms are credited with a rapid growth in unionized workers and in the coverage of wage and collective agreements. The Report also recognises the research findings that the Chinese reforms have encouraged the direct election of union representatives and a growth in local and sectoral collective agreements.<sup>91</sup>

More significant is that WDR2013 extends the Bank's vision of labour law's domain beyond the core to what, at points, seems an open-ended catalogue of rights. This expansion stems from an - inchoate if intriguing - theory of the status of labour rights and of the normative foundation of jobs. Social rights emerge in the Report not merely as the preferred adjuncts of a job, but rather as prerequisites,

All countries have subscribed to a set of universal rights..... Thus, some work activities are widely viewed as unacceptable and should not be treated as jobs.<sup>92</sup>

This normative restriction on the nature of a job governs the breadth of the plateau. The concept of 'good jobs for development' is tied to a strikingly expansive raft of international norms, which are characterised as embodying 'basic human rights.'<sup>93</sup> These norms are extensive in both subject-matter and source: a reference to rights from international and regional frameworks<sup>94</sup> is elaborated to embrace a range of international human rights instruments<sup>95</sup> and regional regimes that include the European Convention on Human Rights,<sup>96</sup> European Social Charter<sup>97</sup> and the Inter-American Convention on Human Rights.<sup>98</sup> WDR2013 also sidesteps the reservations about the status of working conditions rights that emerged in the pre-crisis era.<sup>99</sup> The inclusion of Article 23 of the Universal Declaration of Human Rights among the normative preconditions of a job, extends the objectives of legitimate regulation to just and favourable working conditions, protection against unemployment, and remuneration that ensures 'an existence worthy of human dignity' for the

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<sup>90</sup> World Bank *World Development Report 2013* (n 56) 266, Box 8.3.

<sup>91</sup> Chang Hee Lee and Mingwei Liu 'Collective Bargaining in Transition: Measuring the Effects of Collective Voice in China' in Susan Hayter (ed), *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (Edward Elgar 2011) and *Measuring the Effects of the Collective Voice Mechanism and the Labour Contract Law: A Survey of Labour Relations and Human Resource Management Practices in China* (International Labour Organization, 2011).

<sup>92</sup> World Bank *World Development Report 2013* (n 56) 155.

<sup>93</sup> Ibid 65.

<sup>94</sup> Ibid 156.

<sup>95</sup> Convention on the Elimination of all Forms of Discrimination Against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), *entered into force* 3 Sept. 1981; Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), *entered into force* 2 Sept. 1990; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, 2220 U.N.T.S. 93, 30 I.L.M. 1517 (1991), *entered into force* 1 July 2003; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. res. 61/106, Annex I, U.N. GAOR, 61<sup>st</sup> Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (13 Dec. 2006), 46 I.L.M. 443.

<sup>96</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, Europ. T.C. No. 5; 213 U.N.T.S. 221.

<sup>97</sup> European Social Charter, 18 Oct. 1961, 529 U.N.T.S. 89; Europ. T.S. No. 35.

<sup>98</sup> American Convention on Human Rights, 22 Nov. 1969, 9 I.L.M. 673 (1970), *entered into force* 18 July 1978. The expansive treatment of labour rights in WDR2013 is uneven. In the Glossary, for example, 'rights' are defined to include only the core labour standards and health and safety at work, 330.

<sup>99</sup> McCann 'The Holistic Assessment of Non-Standard Work Norms' (n 16).

worker and his family.<sup>100</sup> Throughout, further, the Report assumes the viability of EPL and minimum wage frameworks that are more protective than the minimal interventions foreseen in the *Doing Business* literature.<sup>101</sup> With respect to the ILO, as would be expected the Report references the 1998 *Declaration*, and therefore the fundamental standards.<sup>102</sup> Yet international labour standards (ILS) beyond the fundamental Conventions are also recognised, including, explicitly, instruments on working time, social security, health and safety, and labour inspection.<sup>103</sup>

The World Bank's image of the good job therefore encroaches on the ILO's normative domain. Yet, to return to the question of institutional autonomy addressed in the pre-crisis era in Section 1, it is revealing that the regulatory expansion in WDR2013 is realised primarily through recourse to human rights instruments.<sup>104</sup> Most conspicuously, the Report does not engage with a comparable expansion in the ILO's legal policy narrative. The ILO's 2008 *Declaration on Social Justice for a Fair Globalization* was adopted just prior to the global financial crisis and has shaped the ILO's response. The *Declaration*, of equal status to its 1998 antecedent, asserts the breadth of the ILO's policy realm. It highlights the four 'strategic objectives' in which the work of the ILO has been configured since the end of the last century: fundamental principles and rights, employment, social protection and social dialogue.<sup>105</sup> These objectives are then characterised - in a formula akin to the concept of indivisibility<sup>106</sup> - as 'inseparable, interrelated and mutually supportive.'<sup>107</sup> The ILO has therefore elevated non-core objectives of labour law frameworks within its guiding regulatory policy discourse. It also re-centred the improvement of working conditions by explicit reference to one of the Organization's foundational texts, the *Declaration of Philadelphia*, specifically to its call for 'policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection.'<sup>108</sup>

Yet WDR2013, despite initiating a comparable broadening of the substantive scope of legitimate labour regulation, does not make any reference to the 2008 *Declaration*. Thus the expanded regulatory terrain of the World Bank is not mapped to the ILO's elaboration of the relative status of core and non-core rights. This omission suggests that the institutional convergence between these global policy actors has stalled since the crisis. The regulatory narratives of the institutions continue to proceed in similar trajectories, yet with limited shared reference points. As a result, the ILO's normative discourses are more autonomous, yet less influential. This institutional divergence threatens the influence of ILS on the World Bank's rendition of labour regulation on the plateau. It also hints at a diminished status for the ILO, at least in the Bank's policy discourses.<sup>109</sup> It also threatens to obscure ILO normative frameworks and policy discourses that could suggest regulatory strategies, standards and outcomes for regulation on the plateau. Certainly the ILO's minimum

<sup>100</sup> Universal Declaration of Human Rights, 10 Dec. 1948, U.N.G.A. Res. 217 A (III) (1948).

<sup>101</sup> e.g. World Bank *World Development Report 2013* (n 56) 260-263.

<sup>102</sup> Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

<sup>103</sup> World Bank *World Development Report 2013* (n 56) 156.

<sup>104</sup> See in particular World Bank *World Bank World Development Report 2013* (n 56) 156.

<sup>105</sup> ILO *Decent Work* (ILO 1999).

<sup>106</sup> On indivisibility and the 1998 *Declaration*, see Alston (n 19); Alston and Heenan (n 19).

<sup>107</sup> *Declaration on Social Justice for a Fair Globalization 2008* Part I.B.

<sup>108</sup> Ibid Part I.A(ii).

<sup>109</sup> It remains to be seen whether this trend will be reversed. The Independent Review Panel recommended that the Bank's future quantification work should be pursued jointly with the International Labour Organisation. Independent Review Panel (n 49) 36.

wages<sup>110</sup> and employment protection<sup>111</sup> standards do not trouble the WDR2013 analysis of the parameters of the kindred domestic legal frameworks (see further Section 3.1 below).<sup>112</sup>

On the nature and functioning of legal regulation, second, Section 1 identified as a key criticism of the *Doing Business* methodology that it does not account for the de facto influence of legal rules on the practices of working life and, therefore, for the effectiveness of legal norms. One of the central contributions of the recent literature is to pinpoint legal effectiveness as a key dilemma of contemporary labour market regulation.<sup>113</sup> Comparable doubts about the effective functioning of legal frameworks haunt the World Bank's new appreciation of labour regulation. As a starting point, the familiar chasm is discerned between 'law on the books' and 'law in practice',<sup>114</sup>

Even in countries that have ratified the core labour standards and have laws on the books, children work in harmful conditions, discrimination happens in access to jobs and in pay, forced labor persists, and freedom of association is limited. Commitments in treaties, conventions, and laws may not change the institutions, practices, and behaviours that affect workers' rights on their own.<sup>115</sup>

Such deficiencies are explained as a function of a set of limitations of regulatory design. The Report lists the features of legal frameworks that preclude protected status.<sup>116</sup> Legislative exceptions are illustrated by the widespread exclusion of domestic workers, family workers, workers in small enterprises and in export zones, and unpaid family workers in agriculture and enterprises.<sup>117</sup> The complexities of regulating tripartite relations are acknowledged in an observation that the growth in agency-supplied labour 'complicates legal accountability'.<sup>118</sup> The Report also notes the constraints on workers in the informal economy accessing adjudication mechanisms.<sup>119</sup> Each of these factors impedes effective regulation and have been well-documented in the precarious work and informality literatures.<sup>120</sup> Yet this analysis neither captures the broader challenges of conceptualising the

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<sup>110</sup> Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), Minimum Wage Fixing Convention, 1970 (No. 131) and, as relevant, the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99), Plantations Convention, 1958 (No. 110), Articles 24 and 25, and Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117) Article 10.

<sup>111</sup> Termination of Employment Convention, 1982 (No. 158).

<sup>112</sup> World Bank *World Development Report 2013* (n 56) 260-263.

<sup>113</sup> See e.g. Michael Piore and Andrew Schrank, 'Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World' (2008) 147(1) *International Labour Review* 1; Lee and McCann 'Measuring Labour Market Institutions' (n 18); David Weil and Carlos Mallo, 'Regulating Labour Standards Via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance' 2007 45(4) *British Journal of Industrial Relations* 791; Tzehainesh Tekle (ed), *Labour Law and Worker Protection in Developing Countries* (Hart 2010); John Howe, Tess Hardy and Sean Cooney, 'Mandate, Discretion and Professionalisation at an Employment Standards Enforcement Agency: An Antipodean Experience' (2013) 35 *Law & Policy* 81.

<sup>114</sup> World Bank *World Development Report 2013* (n 56) 156-157.

<sup>115</sup> Ibid 156.

<sup>116</sup> Ibid.

<sup>117</sup> The Report cites ILO *Coverage of Domestic Workers by Key Working Conditions Laws* (ILO: 2011); Fredman 'Anti-Discrimination Laws and Work in the Developing World: A Thematic Overview' (Background Paper for the WDR 2013) (World Bank: 2012).

<sup>118</sup> World Bank *World Development Report 2013* (n 56) 156.

<sup>119</sup> Ibid.

<sup>120</sup> See, for example, Leah Vosko (ed), *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen's University Press 2000); Judy Fudge and Leah Vosko, 'By Whose Standards? Re-regulating the Canadian Labour Market' (2001) 22 *Economic and Industrial Democracy* 271; Judy Fudge and Rosemary Owens (eds) *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart 2006); McCann *Regulating Flexible Work* (OUP 2008); Tekle (n 113); Fudge, McCrystal and Sankaran (n 45).

complex operation of contemporary labour law frameworks nor suggests the future of regulatory design. These issues are addressed in the following Section.

### **3. Towards regulatory policy for endogenous norms**

Given the promise that WDR2013 holds for international labour regulation policy, it is worth taking seriously the Bank's image of the regulatory plateau as the locus of apt labour regulation. The remainder of this Section investigates the imagery of the plateau. Its aim is to reflect on the needs of a regulatory policy that is poised at the international level: having global resonance, acknowledging the diversity of country conditions, and responding to the demands of fragmented labour markets and of low-income settings. To offer a contribution to this multi-faceted debate, the Section considers whether the insights of the recent labour regulation literature can enrich the project of regulation on the plateau. It centres on three conceptions of the operation of legal frameworks that have emerged from recent insights on regulation: regulatory indeterminacy, institutional dynamism and the holistic assessment of precarious work regulation.

#### **3.1 Regulatory indeterminacy and the edges of the plateau**

As related in Section 1, the regulation research has exposed a conception of legal norms that is embedded in conventional economic narratives: external impositions on an otherwise well-functioning market that are self-executing and protect all workers within their formal scope.<sup>121</sup> A contrasting imagery, grounded in the neo-institutional tradition, offers an alternative depiction of legal frameworks, in which legal rules are recognised as endogenous and context-dependent.<sup>122</sup> As Deakin has elaborated,

In this approach, legal rules are understood as devices for coordinating the expectations of actors under conditions of uncertainty. Laws are not simply imposed in a top-down fashion but, just as often, crystallize conventions which first emerge at the level of exchange relations before being formalized in contractual agreements and, at a further level, legal texts..... To understand labour law in this way is to see it not as an external force imposed upon an otherwise 'unregulated' market, but as endogenous to market processes and political structures.<sup>123</sup>

Conceiving of legal rules as endogenous norms in this way has implications for understanding their influence on the practice of working relations. In Deakin's words, 'the operation of legal rules depends upon contextual factors which vary across time and space.'<sup>124</sup> The recognition that labour regulations are endogenous and their effects context-dependent therefore precludes any universally applicable threshold for 'good' labour regulations.<sup>125</sup> There is no reason, that is to say, to assume that the benefits curve in Figure 1 (above) will be identical across countries. In fact it would be expected that the curve would vary, as illustrated by the curve for Country B in Figure 1. This insight is reflected in the recent literature in the recognition of the indeterminacy of legal norms. The notion of regulatory indeterminacy emerged in the work of Deakin and Sarkar to convey that the economic effects of labour law reform projects are a priori indeterminate<sup>126</sup> and has since been developed by Lee and McCann into a notion of 'protective indeterminacy,' to capture indeterminacy

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<sup>121</sup> Deakin (n 4), Lee and McCann, 'The Impact of Labour Regulations' (n 4).

<sup>122</sup> Deakin (n 4).

<sup>123</sup> Ibid 35

<sup>124</sup> Ibid 35-36.

<sup>125</sup> Lee and McCann 'Regulatory Indeterminacy' (n 4) 16-17.

<sup>126</sup> Deakin and Sarkar (n 4).



in the protective strength of labour regulations.<sup>127</sup> Regulatory indeterminacy implies that that translation of legal standards into working practices depends upon factors beyond law.

WDR2013 recognises the potential for fluctuation in the effects of legal norms, both cross-national and temporal: '[the e]dges of plateau vary across countries and even within countries over time, as conditions change...'<sup>128</sup> In this regard, the Report partially integrates the insights of the research literature. Regulatory indeterminacy inevitably renders the optimal form and intensity of laws on the regulatory plateau difficult to predict. The project of mapping the edges of the plateau therefore becomes crucial to the Bank's renewed assessment of labour regulation. In WDR2013, this quest is centred substantially on EPLs and minimum wage regulations: "[t]he main challenge is to set EPL and minimum wages so that they address the imperfections in the labor market without falling off the plateau."<sup>129</sup> The range of countries that host appropriate legal frameworks appears to be fairly extensive: '[m]any countries appear to set EPL and minimum wages in a range where impacts on employment or productivity are modest.'<sup>130</sup> The crucial challenge, however, is not identifying the potential scope of plateau but instead the intricate puzzle of fixing its edges at country level.

In this regard, the indications of the Bank's assessment of the edges of the plateau in WDR2013 are not fully convincing. The rim of the plateau is conveyed primarily as an assertion about the effects of two labour law projects: EPLs at state-level in India and minimum wage legislation in Colombia. To illustrate rigid legislation, the report contends that (1) Indian states with 'more restrictive' EPL have significantly lower employment and output and that (2) increases in the Colombian minimum wage in the late 1990s resulted in substantial employment loss.<sup>131</sup> Yet the evidence cited in support of the Report's contentions is strikingly slim. Evidence on the effects of state laws in India is drawn primarily from the work of Ahsan and Pagés<sup>132</sup>; the other studies cited are not directly relevant.<sup>133</sup> The assessment of the effects of the Colombian minimum wage is based on Kucera and Roncolato,<sup>134</sup> who explicitly stress that the Colombian case is not representative and conclude that it is best understood as an illustration that 'badly designed and implemented labour regulations can have negative repercussions.'<sup>135</sup> Most significantly, the Bank's assessment does not account for the range of alternative explanations for economic impacts, even those reflected in more sophisticated analyses elsewhere in the Report (see Section 2 above).<sup>136</sup> It can be suggested that careful

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<sup>127</sup> Lee and McCann 'Regulatory Indeterminacy' (n 4).

<sup>128</sup> World Bank *World Development Report 2013* (n 56) 263.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid 262.

<sup>131</sup> Ibid 262-263.

<sup>132</sup> Ahmad Ahsan and Carmen Pagés, 'Are All Labor Regulations Equal? Evidence from Indian Manufacturing' (2009) 37 *Journal of Comparative Economics* 62.

<sup>133</sup> On India, the Report cites a cross-national comparison of Asian countries that does not compare Indian state-level legislation: Wendy Carlin and Mark Schaffer 2011 'A Comparison of Business Environment Constraints between Formal Sector Firms and Rural and Informal Sector Firms' (World Bank 2011), cited in World Bank *More and Better Jobs in the South* (World Bank 2011).

<sup>134</sup> David Kucera and Leanne Roncolato, 'Informal Employment: Two Contested Policy Issues' (2008) 147(4) *International Labour Review* 321..

<sup>135</sup> Ibid 338. Columbia's minimum wage, already among the highest in the region, was increased during the late-1990s recession. Kucera and Roncolato compare Lemos' findings on Brazil, which found higher minimum wage to reduce earnings inequality without reducing employment for either workers generally or for vulnerable workers: Sara Lemos, 'Minimum Wage Effects across the Private and Public Sectors in Brazil' (2007) 43(4) *Journal of Development Studies* 700.

<sup>136</sup> Kucera and Roncolato, for example, note that the effects of minimum wage increases on formal employment depend on a range of factors that include e.g. the difference between minimum and prevailing wages (citing Catherine Saget, *Wage Fixing in the Informal Economy: Evidence from Brazil, India, Indonesia and South Africa* (Conditions of Work and Employment Series No. 16) (ILO 2006); François Eyraud and Catherine Saget, 'The Revival of Minimum Wage Setting Institutions,' in Berg and Kucera (n 18).

measurement is needed to identify apt regulatory systems for a particular country context that will generate the optimal degree of regulation on the benefits curve. More broadly, the abstract and static depiction of legal measures characteristic of conventional economic theory should be replaced by models that capture the intricacies of regulatory design and implementation.<sup>137</sup> Detailed knowledge of the context (institutional frameworks, enforcement mechanisms, social norms etc.) is therefore necessary for the effects of labour law reforms to be predicted.<sup>138</sup>

### 3.2 Institutional dynamism

A second dimension of regulation on the plateau is hinted at by an aside in WDR2013 on the operation of legal regulation in the informal economy. The Report mentions in passing the evidence of ‘lighthouse effects’ of minimum wage reforms, through which increases in the minimum wage function as a reference wage for the informal economy.<sup>139</sup> This observation is a partial recognition of a phenomenon that has a more significant potential for regulatory policy on endogenous norms. It was noted in Section 1 above that the formalist policy narrative on the economic impact of labour regulation reads labour law frameworks as static and constrained. This literature assumes that the influence of legal frameworks is determined by their textual and institutional parameters. Recent contributions suggest, however, that labour law systems are better understood to harbour dynamic capacities beyond their formal demands.

Lee and McCann have proposed the notion of institutional dynamism to account for the capacity of legal frameworks to operate beyond their formal parameters.<sup>140</sup> Intended for analytical, measurement and policy purposes, institutional dynamism can be classified as external or internal in form. External dynamism denotes the influence of labour law norms beyond their formal reach. It therefore embraces the range of processes alluded to in WDR2013 – and as yet imperfectly understood – through which labour norms take effect in informal settings (adherence to norms of social behaviour, awareness of statutory standards<sup>141</sup> etc.) In its internal form, institutional dynamism denotes the capacity of regulatory regimes to host multiple interactions between a range of institutions. A key illustration is the operation of ‘ripple effects,’ through which increases in the minimum wage affect wages above its level.<sup>142</sup>

The notion of institutional dynamism offers a useful imagery of legal norms, which can inform regulation on the plateau. It has been argued to be both a significant component of regulatory indeterminacy and a gateway to improved protective outcomes.<sup>143</sup> Yet WDR2013 does not fully grasp the dynamic potential of regulatory frameworks. The ‘pessimistic’ account of domestic

<sup>137</sup> Lee and McCann, ‘Measuring Labour Market Institutions’ (n 18).

<sup>138</sup> Deakin (n 4).

<sup>139</sup> World Bank *World Development Report 2013* (n 56), 260-261, citing Paulo R. Souza and Paulo E. Baltar, ‘Salario Mínimo e Taxa de Salários no Brasil’ (1980) 10 *Pesquisa e Planejamento Econômico* 1045; Tito Boeri, Pietro Garibaldi and Marta Ribeiro, ‘The Lighthouse Effect and Beyond’ (2011) 57 *Review of Income and Wealth* S54; and Marcelo Neri, Gustavo Gonzaga and José Márcio Camargo, ‘Salário Mínimo, Efeito Farol e Pobreza’ (2001) 21(2) *Revista de Economia Política* 79.

<sup>140</sup> Lee and McCann ‘Regulatory Indeterminacy’ (n 4).

<sup>141</sup> On legal awareness, see further Lee and McCann ‘The Impact of Labour Regulations’ (n 4).

<sup>142</sup> Richard Freeman, ‘The Minimum Wage as a Redistributive Tool’ (1996) 106 (May) *Economic Journal* 639; ILO *Global Wage Report 2010/2011: Wage Policies in Times of Crisis* (ILO 2010); Damian Grimshaw, Jill Rubery and Gerhard Bosch, ‘The Pay Equity Effects of Minimum Wages: A Comparative Industrial Relations Approach’ in McCann et al *Creative Labour Regulation* (n 4); Sangheon Lee and Kristen Sobeck, ‘Low-Wage Work: A Global Perspective’ (2012) 151(3) *International Labour Review* 141; Sangheon Lee and Megan Gerecke, ‘Regulatory Indeterminacy and Institutional Design in Minimum Wages: Decentralization, Coordination, and Politics in Asian Minimum Wages’ (3<sup>rd</sup> *Regulating for Decent Work* Conference, Geneva, July 2013).

<sup>143</sup> Lee and McCann ‘Regulatory Indeterminacy’ (n 4).

frameworks outlined in Section 1, which disregards informal economies as sites of regulatory intervention, has been tempered. Envisaging a protective future for the informal economy, the Report asserts that vulnerable workers should have mechanisms for voice and protection ‘regardless of whether they are wage earners.’<sup>144</sup> In elaborating the needs of workers in informal relations, however, the Report centres primarily on social protection frameworks<sup>145</sup> (although noting the evolving role of associations of self-employed workers in protecting legal rights, through negotiating with governments, for example, and pursuing litigation strategies on e.g. the construction of malls, harassment, confiscation of inventories).<sup>146</sup>

Other interventions that act on informal working relations, however, are not fully integrated into the analysis. The regulatory plateau model would benefit from considering mechanisms that are tailored to improving the quality of jobs in informal work. Minimum wage legislation is an obvious candidate as a site of experimentation with institutional dynamism in both forms. Recent research on Europe has found ripple effects of minimum wage legislation to enhance pay equity, through their impact on low-wage employment, gender pay inequality and wage compression in the lower half of the wage structure. Grimshaw Rubery and Bosch have found an association between ripple effects and strong – dual or inclusive<sup>147</sup> – industrial relations systems, and that unions with defined pay equity strategies can heighten these effects.<sup>148</sup> Ripple effects are also worth investigating in low-income countries. They can be substantial where minimum wages are used by workers as basis for wage negotiation.<sup>149</sup> This phenomenon has recently been observed in Asian countries, including the Philippines, China and Vietnam,<sup>150</sup> and strengthens the negotiation role of associations of informal workers that is already foreseen by the Bank. This evidence points to a significant if neglected policy role for the minimum wage, in which it is available to integrate into formalization and poverty alleviation strategies in low-income countries.<sup>151</sup>

### 3.3 The holistic analysis of precarious work regulation

Finally, the World Bank’s new policy discourse on labour regulation is conspicuously tentative in its treatment of non-standard forms of work.<sup>152</sup> WDR2013 calls for legal protections for ‘the most vulnerable.’<sup>153</sup> The analysis neglects, however, the tendency of non-standard configurations to both disrupt the certainties of conventional regulatory frameworks and also, in recent decades, to propel labour law towards novel regulatory forms. This neglect is more broadly resonant of contemporary labour regulation policy.<sup>154</sup> Yet the recent research has cited the accelerating fragmentation of labour markets as one of the key drivers of regulatory indeterminacy and elaborated these fragmentation processes to include both heightened recourse to non-standard working arrangements and the intersecting pressures that generate informality.<sup>155</sup> This fragmentation generates a divergent application of legal entitlements and obligations, thus triggering substantial variation in the effectiveness of regulatory frameworks.

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<sup>144</sup> World Bank *World Development Report 2013* (n 56) 22.

<sup>145</sup> See in particular World Bank *World Development Report 2013* (n 56) 272-276.

<sup>146</sup> Ibid 266-267.

<sup>147</sup> Duncan Gallie, *Employment Regimes and the Quality of Work* (OUP 2007).

<sup>148</sup> Grimshaw, Rubery and Bosch (n 142).

<sup>149</sup> Lee and Gerecke (n 142); ILO *Global Wage Report 2010/2011* (n 142).

<sup>150</sup> Lee and Gerecke *ibid*.

<sup>151</sup> See also Taryn Dinkelman and Vimal Ranchod, ‘Evidence on the Impact of Minimum Wage Laws in an Informal Sector: Domestic Workers in South Africa,’ (2012) 99(1) *Journal of Development Economics* 27.

<sup>152</sup> Bakvis (n 66).

<sup>153</sup> World Bank *World Development Report 2013* (n 56) 257.

<sup>154</sup> McCann ‘The Holistic Assessment of Non-Standard Work Norms’ (n 16).

<sup>155</sup> Lee and McCann ‘Regulatory Indeterminacy’ (n 4).

Yet labour market fragmentation is challenging to conceptualize in research, and in particular to capture through the use of empirical methods,<sup>156</sup> thus inhibiting an accurate understanding of the nature and influence of labour regulation on the plateau. As a contribution towards unravelling the complexities of this project at the conceptual level, a holistic analysis of non-standard work regulation has been proposed, to suggest that the nature and effects of labour law should be understood to be in part defined by the legal treatment of non-standard workers.<sup>157</sup> In consequence, it is contended, analyses of labour law sub-fields should no longer focus exclusively on generally-applicable norms; instead, they should be expanded to integrate the governance of non-standard work. The holistic strategy, further, can readily be expanded to embrace analyses of the regulation of informal working relations. This conceptual strategy expands the analysis of regulation to embrace protective lacunae and also the bespoke norms that have been devised to protect workers in non-standard and informal relations. It thereby offers a more accurate and comprehensive understanding of the evolution of labour law.

The primary contribution of WDR2013 on non-standard work was noted in Section 2: the Bank acknowledges the tendency of multipartite working relations to repel labour law's protective reach.<sup>158</sup> Yet no solution is ventured for this problem, and regulatory options already under experimentation are ignored (specific allocation of legal obligations, joint liability, restrictions on the supply of agency work etc.)<sup>159</sup> The legal policy response to informality, further, brakes at efforts to expand social protection and representation and negotiation by associations of the self-employed. A holistic analysis of the regulation of non-standard work and the informal economy would further refine the paradigm of the regulatory plateau to advance effective regulation. This is an arena, for example, in which the Bank's recent neglect of ILO non-core standards, outlined in Section 2, obscures regulatory techniques. Regulatory strategies that are widely deployed in European domestic legal orders can be derived from the ILO's non-standard work instruments.<sup>160</sup> Conventional forms of regulation also remain relevant. The potential of the minimum wage as a site of experimentation with external dynamism was outlined in Section 3.2. Yet, the regulatory plateau model would also benefit from absorbing formalisation strategies of the kind advocated by Fenwick et al<sup>161</sup> and, more recently, in McCann and Murray's investigation of domestic work as an entry-point for legal regulation of informal working relations.<sup>162</sup>

## Conclusions

The regulatory trajectory of the crisis era can be parsed, schematically, as an early embrace of forceful market regulation upended by a reversion to the deregulatory orthodoxy. It is notable, then, that the progression of the World Bank's account of labour regulation over this period has been towards a tentative embrace of protective goals. Building on Rittich's analysis of the fragmentation of international labour law, this paper has assumed that the World Bank, having adopted a guiding role in disseminating labour governance norms,<sup>163</sup> will be crucial to labour law's future. It is

<sup>156</sup> A key feature of Botero et al's methodology is that it is based on the assumption that legal standards are applied to a 'standard' worker and employer, Botero et al (n 12); see also Berg and Cazes (n 7).

<sup>157</sup> McCann 'The Holistic Assessment of Non-Standard Work Norms' (n 16).

<sup>158</sup> World Bank *World Development Report 2013* (n 56) 156.

<sup>159</sup> Limiting abuse by employment intermediaries is suggested in the Report's 'Overview' but not subsequently investigated, *ibid* 27.

<sup>160</sup> e.g. Home Work Convention, 1996 (No. 177); Part-Time Work Convention, 1994 (No. 175), Domestic Workers Convention, 2011 (No. 189).

<sup>161</sup> Colin Fenwick, John Howe, Shelley Marshall and Ingrid Landau *Labour and Labour-Related Laws in Micro and Small Enterprises: Innovative Regulatory Approaches* (ILO SEED Working Paper No. 81) (ILO: 2007).

<sup>162</sup> Deirdre McCann and Jill Murray, 'Prompting Formalisation through Labour Market Regulation: A 'Framed Flexibility' Model for Domestic Work' (2014) *Industrial Law Journal* (forthcoming).

<sup>163</sup> For an account of its rise, see in particular Rittich 'Rights, Risk, and Reward' (n 2).

therefore essential that scholarly accounts of labour regulation accurately portray the imagery of labour law generated by this institution.

The paper has suggested that a critical relationship within the international legal policy scene - between the World Bank and ILO - is best understood as a dynamic process of institutional convergence and divergence. This interaction, further, can be read to generate a conversation about the objectives, format and tenor of labour market regulation. Within this frame, the paper has reappraised the *Doing Business* project as substantially pivoting on the core/non-core narrative donated by the ILO. The declining fortunes of *Doing Business*, sealed by WDR2013, heralded a pronounced shift in World Bank discourses towards an imagery of a regulatory plateau.

The plateau narrative is open to more expansive substantive policy goals than its antecedents and hosts a more sophisticated understanding of the nature, functioning and economic effects of legal regulation. Yet the precise content of the favoured regulatory frameworks has yet to emerge. A halt in the Bank's institutional dance with the ILO has exiled the ILS, distancing a useful source of regulatory models. Further, in recognising the potential for fluctuating effects the Bank offers a glimpse of Deakin's analysis of legal regulation, of endogenous norms with context-dependent impacts. Yet it does not fully confront the challenges of regulatory design for endogenous norms. WDR2013 ushered the Bank into the uncertain world of contextualised labour regulation. This paper has raised a set of crucial challenges for conceptualising such legal frameworks, of indeterminate outcomes, dynamic norms and the destabilising presence of precarious work. It has suggested that the response should be a sustained, and more curious, engagement with the complexities and capacities of labour regulation.